liability for loss.[13] In a recent case it was held that a shipper against whom a carrier had discriminated might bring *mandamus* in a state court to compel the railroad to perform its common law duty.[14] *Mo. Pac. R. R.* v. *Larabee Mill Co.*, 29 Sup. Ct. Rep. 214 (Jan. 11, 1909). The court distinguishes another recent decision [15] on the ground that there a direct burden was imposed on interstate commerce, while in the principal case the state was merely exercising its police power in a manner that incidentally burdened such commerce. A further distinction would seem to appear in that in the McNeill case the regulation was made by a state board, while the Interstate Commerce Commission was created to make just such regulations; so Congress could fairly be said to have acted, thereby excluding action by such state board.

THE LAW OF THE CASE. — In a recent case it was held on a second appeal to an intermediate court, after the former appeal had resulted in a remand for a new trial under certain rulings, that the trial court erred in following an intervening decision of the highest court inconsistent therewith. *District of Columbia* v. *Brewer*, 37 Wash. L. Rep. 65 (D. C., Ct. App., Jan. 5, 1909). While the inferior courts would, of course, be bound by such decision in subsequent cases, the opinion holds that the rulings are final as to the case in which they are given in the intermediate and trial courts. This is an application of the so-called doctrine of *the law of the case*, a doctrine that the rulings of a court of last appeal conclusively settle the law as to the case in which they are given, not only in the lower courts, but also in the court giving them. The principal case applies it to the rulings of an intermediate court when that is the last court to which appeal is taken. And the rule is supported by the weight of authority to that extent.[1]

For orderly procedure inferior courts must be bound by the decision of their supreme court in the particular case. But the situation becomes somewhat startling when the supreme court applies the rule to itself and refuses on subsequent appeal to correct its former mistakes. The explanation is that a suit must be ended somewhere, and that it seems worth while to curtail litigation at the expense of a misdecision in isolated cases. Whether this should extend to the rulings of the last intermediate court to which appeal is prosecuted seems to depend on whether the defeated party by accepting a new trial on the basis of those rulings has lost his right to appeal therefrom. If he has not, the rule does not logically apply, because it rests on the ground that the holdings in question are the last word in the case on that issue, and the only practical result of its application would be to force the parties to further proceedings to attain precisely the same result. If he has, the decision of the intermediate court stands on the same footing

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[13] Chic. Milw. & St. P. R. R. *v.* Solan, 169 U. S. 133.

[14] Mr. Justice Holmes concurred on the ground that the cars had not yet been appropriated to interstate commerce. *Cf.* Norfolk & W. R. R. *v.* Comm., 93 Va. 749.

[15] McNeill *v.* Southern R. R., 202 U. S. 543, which held unconstitutional a regulation imposed by a state railway board, that certain classes of freight should be delivered to the consignees on spur tracks.

[1] Ogle *v.* Turpin, 8 Ill. App. 453; note in 34 L. R. A. 321–347; 26 Am. & Eng. Encyc., 2 ed., 184.

as the decision of a court of last appeal. There is a conflict in practice whether the right of appeal is thus lost.[2] It certainly expedites matters to deny the appeal, and while there is unquestionably hardship to the one party in denying it, there is also hardship to the other in allowing it; for he is thereby subjected to unnecessarily protracted litigation.

There is vigorous dissent from the rule in several states,[3] which point out that courts waver between *stare decisis* and *res judicata* as the basis for the rule, and contend that it cannot be supported on either — not on *stare decisis*, because the former holding is absolutely conclusive; not on *res judicata*, because the rule is applied where, as in the principal case, no judgment is given, and the case is merely remanded for a new trial. Obviously the doctrine has nothing to do with *stare decisis*; for admittedly the court would repudiate its holding if it were proffered in another case. And, equally obviously, a matter cannot be *res judicata* unless there has been a judgment. But it is not conceived how the higher court can reverse the decision of the trial court and remand the case for a new trial without adjudicating anything. The adjudication may be on a question purely of law; and so it has been said that, since *res judicata* depends on estoppel and since there can be no estoppel on a question of law, the doctrine again falls from that basis.[4] *Res judicata*, however, does not depend on estoppel:[5] it means simply that the judgment of the court has settled the case between the parties, and there is no good reason why it should not apply to an issue of law.

THE ENGLISH VIEW OF CAPACITY IN INTERNATIONAL MARRIAGES. — In the light of the adjudged cases and the language used in deciding them, it is difficult to say whether an English court will apply the *lex loci* or the *lex domicilii* to determine matrimonial capacity.[1] Professor Dicey[2] thinks that *Ogden* v. *Ogden*[3] has lessened the authority of the sweeping *dicta* in *Sottomayer* v. *de Barros I;*[4] but his recently issued book states the domiciliary law still to be supreme, with "possible doubtful exceptions."[5] However, Lord Barnes, who delivered the judgment in *Ogden* v. *Ogden*, has lately decided, in words strongly favoring the *lex loci*, that a Hindu who marries an English girl in England cannot set up against the validity of the marriage a disability imposed upon him by the law of his caste. *Venugopal Chetti* v. *Venugopal Chetti*, 25 T. L. R. 146 (Eng., Prob. Div., Dec. 7, 1908).

It is noteworthy that here by no ingenuity can the alleged defect be twisted into one of form or ceremony,[6] as to which all agree that the local law should

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[2] Sidenback *v.* Riley, 111 N. Y. 560; Geraghty *v.* Randall, 18 Colo. App. 194.
[3] Hastings *v.* Foxworthy, 45 Neb. 676. But see Smith *v.* Neufeld, 61 Neb. 699.
[4] 18 HARV. L. REV. 389.
[5] See Wells, Res Adjudicata and Stare Decisis, 1.

[1] See 15 HARV. L. REV. 382; 18 *ibid.* 226; 2 Beale, Cas. Conf. Laws, 41 ff.
[2] Dicey, Conf. Laws, 2 ed., 838.
[3] [1908] P. 46.
[4] L. R. 3 P. D. 1.
[5] Dicey, Conf. Laws, c. xxvii.
[6] Thus the adherents of the domiciliary doctrine explain Simonin *v.* Mallac, 2 Sw. & Tr. 67, and Ogden *v.* Ogden, *supra*, where the parental consents required by French law were lacking.